Cartel prosecution in the US and the EU - recent developments

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It is commonplace that, in virtually all jurisdictions which have anti-trust law, the detection and punishment of cartels has become a top priority.

This chapter discusses important recent developments in cartel prosecution in the US and the EU, by reference to the decisions of the regulatory authorities, relevant case law, and legislative and policy developments. It addresses the following three principal issues:

- Attempts to deter cartels, including fines, criminal sanctions and search warrants.
- The current status of applicants under the amnesty and immunity programmes, with particular reference to later applicants.
- Developments in the area of private anti-trust litigation.

DETERRENCE

The US

Criminal competition enforcement has continued to be very active in 2005/6, and numerous sanctions have been imposed in ongoing investigations (*see box, Sanctions in ongoing US cartel investigations*).

There has been an increased emphasis on the importance of individual prosecutions as well as corporate fines. Since 1997, the Antitrust Division of the Department of Justice has imposed nearly US$3 billion (about EUR2.4 billion) in criminal fines (including nine fines of US$100 billion (about EUR79 billion) or more). However, in a speech delivered in March 2006, Scott Hammond (the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement) said that jail sentences are the most effective deterrent to cartels (*The American Bar Association's (ABA's) 20th Annual National Institute on White Collar Crime*). He added that both the US Congress and the US Sentencing Commission have acted to lengthen sentences for anti-trust offences (Congress more than tripled the maximum jail term under the Sherman Antitrust Act from three years to ten years in June 2004, and the Sentencing Commission has increased the maximum jail term under the anti-trust guidelines from 33 months to nine years in November 2005). In addition, "no jail" sentencing recommendations for foreign defendants have been eliminated, and the Antitrust Division is increasingly willing to except multiple individuals from corporate plea-bargaining agreements (particularly where the corporate defendant has entered plea-bargaining negotiations at a late stage).

The following new developments have been seen in the field of detection of cartel activity:

- **Co-ordinated raids and search warrants.** The Antitrust Division has shown itself increasingly willing to use these (the US equivalent of EU "dawn raids") in connection with its anti-trust investigations:
  - **February 2006.** The Antitrust Division, in a combined operation with the European Commission (Commission), raided a number of air cargo carriers in the US and overseas in connection with its investigation of anti-competitive practices in the air cargo industry;
  - **June 2006.** In connection with an investigation into the orthopaedic implant industry, the Antitrust Division served five implant manufacturers with subpoenas, and at least one manufacturer, DePuy Inc, acknowledged having had search warrants executed (*www.depuyorthopaedics.com/bgdisplay.jhtml?itemname=newsreleases*);
  - **July 2006.** The Antitrust Division, in connection with its criminal inquiry into Plavix, the pharmaceuticals company, searched two offices at the headquarters of Bristol-Myers Squibb.
- **Wiretapping.** The US Congress recently amended the US Code to allow wiretapping to be used in criminal anti-trust investigations (*18 U.S.C. 2516(r)*). Thomas O Barnett (the Antitrust Division's Assistant Attorney General) noted in June 2006 that this decision is a sign that the US places anti-trust crimes at the same level as other significant economic crimes such as bribery, bank fraud, and mail and wire fraud. However, it is thought that this new power will be used sparingly. It is most likely to be used where the government has an informant in place.

The EU

From September 2005 to September 2006, the Commission has adopted seven prohibition decisions with fines totalling nearly EUR1.5 billion (about US$1.9 billion) (*see table, The European Commission's fines in cartel cases since November 2005*). In spite of the number of prohibition decisions and the level of fines, the Commission is seeking ways to prioritise its cases to manage its workload more efficiently. This is because:

- Almost all of its decisions are challenged before the Court of First Instance (with the possibility of further appeals to the European Court of Justice) (*see table, Court of First Instance (CFI) and European Court of Justice (ECJ) judgments since October 2005*).

- There is a backlog of outstanding leniency applications (*see below, The amnesty and immunity programmes - current status: The EU*).

The most visible example of the Commission's attempt to prioritise cases is its decision not to investigate further in a number of the cases where it refused to grant conditional immunity to an immunity applicant under the Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (2002 Leniency Notice). In these cases, the Commission had not stopped its investigations because it did not think that the applicant had met the 2002 Leniency Notice conditions. Instead, it considered that the cases were not "suitable" for further investigation.

A case may not be suitable for investigation because:

- It is too unimportant for the Commission to investigate, given its limited resources.
- One or more member states' national competition authorities (NCAs) are better placed to consider the matter.

In those cases, the Commission issues a no-action letter.

Plea-bargaining is currently being considered as another way for the Commission to save resources and time without sacrificing deterrence. It has been pioneered in the US and involves parties paying substantial fines in return for a closure of the case. It is an option that the European Commissioner for Competition, Neelie Kroes, is known to find attractive as it would avoid the Commission having to take a case through all the stages of the formal procedure until a prohibition decision is adopted (which takes several years).

In the absence of criminal sanctions and multiple damages claims in private litigation at the EU level, the Commission's strongest deterrent remains civil fines. In June 2006, the Commission provided revised guidelines (*Guidelines on setting fines imposed under Article 23(2)(a) of Regulation No. 1/2003 (OJ 2006 C210/02) (Guidelines on Competition Fines)*). These set out three new rules to increase the deterrent nature of fines:

- The basic amount of the fine (that is, the amount fixed before mitigating or aggravating factors are taken into account) is set at up to 30% of the value of the sales in the relevant product or service market, multiplied by the years of infringement (*section 21, Guidelines on Competition Fines*). For example, participation in the infringement for two years will increase the basic fine by 200% (in contrast to 20% under the previous Guidelines).
- However long a company has participated in the infringement, the Commission includes in the basic fine a sum of between 15% and 25% of the value of sales as an "entry fee" to deter companies from even entering into hard-core cartels (*section 25, Guidelines on Competition Fines*).

SANCTIONS IN ONGOING US CARTEL INVESTIGATIONS

Companies and individuals have been punished recently in the following cartel investigations:

- **The Dynamic Random Access Memory (DRAM) investigation.** The following sanctions have been imposed:
  - **Fines.** Two additional cartel participants have agreed to plead guilty and pay substantial criminal fines (*see www.usdoj.gov/atr/public/press_releases/2005/212002.htm*):
    - in October 2005, Samsung Electronics Company Ltd (together with its US subsidiary, Samsung Semiconductor Inc), agreed to pay a criminal fine of US$300 million (about EUR237 million). This is the second largest criminal anti-trust fine in US history (second only to the US$500 million (about EUR395 million) paid by F Hoffmann-La Roche Ltd in the vitamins cartel in 1999);
    - in January 2006, Elpida Memory Inc agreed to pay a fine of US$84 million (about EUR66 million).

    In total, these new fines and the earlier fines levied against two other participants, Hynix and Infineon (in April 2005 and September 2004 respectively), amount to US$729 million (about EUR575 million).
  - **Sanctions against individuals.** Seven Korean executives (three from Samsung Electronics Company Ltd and four from Hynix) in March of 2006 and one US executive of Samsung Semiconductor Inc in September 2006 agreed to plead guilty and serve prison sentences for their roles in the cartel. Three additional executives (two from Samsung Electronics Ltd and one from Hynix Semiconductor America Inc) were indicted in October 2006. In total, 16 individuals have now been charged in relation to the conspiracy (*see www.usdoj.gov/atr/public/press_releases/2006/215199.htm, www.usdoj.gov/atr/public/press_releases/2006/214843.htm, www.usdoj.gov/atr/public/press_releases/2006/218462.htm* and *www.usdoj.gov/atr/public/press_releases/2006/219102.htm*).
- **The Parcel Tanker shipping industry investigation.** Five companies and five individuals have been charged, and fines totalling more than US$62.3 million (about EUR49.2 million) have been imposed. In addition, charges have now been brought against Stolt-Nielsen SA and its subsidiaries and executives, although it was initially granted immunity (*see box, Revocation of immunity in the US - Stolt-Nielsen*).

- The fines of repeat offenders can be increased by up to 100% (in practice, the fine tends to be increased by no more than 50% (*see Bitumen Nederland (COMP/38.456)*, *Acrylic Glass (COMP/38.645)* and *Belgian Brewers (COMP/37.614)*). Whether an offender is a repeat offender is given a broad interpretation: each earlier infringement justifies a separate increase in the fine. In addition, every breach of Article 81 of the EC Treaty counts as an earlier offence, whether the repeat offender has been fined by the Commission or one or more of the NCAs.

THE AMNESTY AND IMMUNITY PROGRAMMES - CURRENT STATUS

The US

The following issues have seen important recent developments:

- **"Second-in-the-door" applicants (that is, the first firm that expresses a willingness to co-operate with the Antitrust Division investigation following the grant of amnesty to another firm).** Scott Hammond has recently emphasised the importance of penalties for cartel activity (*see above, Deterrence: The US*). However, he has also tried to demonstrate the potential benefits of co-operating with the government, particularly for applicants that are not eligible for full immunity. In a speech delivered at the 2006 ABA Spring Meeting of the Section of Antitrust Law, Hammond addressed the various incentives available to these applicants, and the methods of determining the magnitude of the benefits available. Acknowledging that the benefits of corporate amnesty are transparent, while those for "second-in" applicants are less certain, he described six ways in which a later applicant may expect to benefit from co-operation:

  - the starting point for a fine for a second-in applicant is the minimum under the Sentencing Guidelines, except where the later applicant had a significant leadership role in the conspiracy, or where a "penalty plus" situation applies. Penalty plus concerns where a defendant is co-operating with the government in one investigation, and becomes aware of its infringing conduct in another market, but does not bring it to the government's attention. Fines for penalty plus conduct are imposed at the upper end of the scale;

  - where the information provided by a later applicant expands the scope of the cartel as previously understood by the government, the calculation of the minimum fine does not consider that information;

  - where the information provided substantially advances an investigation, the government can offer a "co-operation discount" on the minimum fine (applied as a percentage to that minimum). Discounts are generally in the range of 30% to 35%;

  - the later applicant can attempt to minimise the number of individual employees who will be prosecuted (for example, in the DRAM investigation, the second applicant Infineon had four individuals which were not included in its plea agreement, the third applicant Hynix had five and the fourth applicant Samsung had seven (*see box, Sanctions in US ongoing cartel investigations*));

  - there is an increased chance that a later applicant will qualify for "amnesty plus". Amnesty plus applies to companies that approach the Antitrust Division to negotiate an agreement in one investigation and disclose the existence of a second, unrelated conspiracy. The companies receive amnesty and pay no fines in the second investigation and receive a substantial discount on its fine in the first conspiracy;

  - there is an increased chance that a second-in applicant may be approached for "affirmative amnesty" (that is, the applicant may be offered amnesty by the Antitrust Division without applying) in an unrelated market where the Antitrust Division is conducting a secret investigation.

  Hammond explained that the amount of a discount depends on:

  - the timing of the co-operation;

  - the value of the information provided;

  - whether the company provides evidence relating to other, unrelated conspiracies.

  Hammond used the Crompton Corporation, the second applicant in the Antitrust Division's rubber chemicals investigation, as an example of the benefits available for exemplary co-operation. Crompton co-operated immediately after learning of the investigation, preserved evidence and provided the government with more than 500,000 documents and more than thirty key witnesses, as well as submitting amnesty applications in four other product areas. In return, Crompton received a 59% discount off its minimum fine.

- **Revocation of amnesty.** 2006 has seen further developments in the Antitrust Division's revocation of the corporate amnesty which had been granted to Stolt-Nielsen Transportation Group Ltd in an investigation into the Parcel Tanker Shipping Industry. Stolt-Nielsen SA, two of its subsidiaries and two of its executives have now been indicted by a federal grand jury on charges of customer allocation, price-fixing and bid-rigging. This is an important case, the first in which amnesty has been revoked in the US. For a timeline of the Stolt-Nielsen proceedings, *see box, Revocation of immunity in the US: Stolt-Nielsen.*

The EU

In an important development, on 29 September 2006, the European Commission published a draft notice containing a number of amendments to the Leniency Notice (*Draft Amendment of the 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases (Draft Notice)*). This contains the following important draft changes and clarifications to the immunity and leniency programme:

THE EUROPEAN COMMISSION'S FINES IN CARTEL CASES SINCE NOVEMBER 2005			
Cartel	**European Commission case reference**	**Total European Commission fines paid by all parties together**	**Annulment action pending before the Court of First Instance (CFI)?**
Copper Fittings	20 September 2006 (reference unknown).	EUR314.7 million (about US$399 million).	Not yet known.
Bitumen Nederland	COMP/38.456, 13 September 2006.	EUR266.717 million (about US$338.2 million).	Not yet known.
Methacrylates	COMP/38.645, 31 May 2006.	EUR344.562 million (about US$436.9 million).	Yes.
Bleach Chemicals	COMP/38.620, 3 May 2006.	EUR388.128 million (about US$492.1 million).	Yes.
Rubber Chemicals	COMP/38.443, 21 December 2005.	EUR75.86 million (about US$96.2 million).	Yes.
Industrial Bags	COMP/38.354, 30 November 2005.	EUR290 million (about US$368 million).	Yes.
Italian Raw Tobacco	COMP/38.281, 20 October 2005.	EUR56 million (about US$71 million).	Yes.
Industrial Thread	COMP/38.337, 14 September 2005.	EUR43.5 million (about US$55.2 million).	Yes.

- **Second-in-the-door applicants.** Under the 2002 Leniency Notice, evidence of "significant added value" is needed to qualify for a reduced fine (*section 21, 2002 Leniency Notice*). There is a new paragraph in the Draft Notice clarifying the concept of significant added value (*section 25, Draft notice*). Officials from the Commission's competition department, Directorate General for Competition (DG COMP), have also provided clarification (*Van Barlingen and Barennes, The European Commission's 2002 Leniency Notice in practice, Competition Policy Newsletter, No. 2005/3*). From these sources, it is possible to distinguish two types of evidence of significant added value:
  - **Evidence that enables the Commission to prove the existence of a cartel.** For example:
    - separate evidence sufficient for proof, where the immunity applicant has produced evidence that is only sufficient to provide the basis for a dawn raid (*see Article 8(a), Leniency Notice*) and during that dawn raid the Commission did not manage to collect decisive evidence of a cartel; or
    - the leniency applicant produces documents or statements that corroborate the immunity applicant's statements or clarify its contemporaneous documents.

CFI case reference	Relevance of the Notice on the non-imposition or reduction of fines in cartel cases (*OJ 1996 C207/04*) (1996 Leniency Notice) or the Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (2002 Leniency Notice)
N/A.	1996 Leniency Notice. Mueller: immunity. IMI: 50% reduction. Delta and Frabo: 20% reduction. Aalberts, Viegener, Legris, Advanced Fluid Connections, Sanha Kaimer, Tomkins, Flowlex, Aquatis France and Simplex Armaturen: no reduction of fine.
N/A.	2002 Leniency Notice. BP: immunity. Kuwait Petroleum: 30% reduction. Nynäs, Shell, Total: no reduction of fine.
T-208/06; T-214/06; T-216/06.	2002 Leniency Notice. Degussa, Röhm and Para-Chemie: immunity. Total, Elf Aquitaine, Arkema, Altuglas and Altumax: 40% reduction. Lucite International and Lucite International UK: 30% reduction.
T-186/06; T-189/06; T-190/06; T-191/06; T-192/06; T-196/06; T-197/06; T-199/06.	2002 Leniency Notice. Degussa: immunity. Akzo Nobel, Akzo Nobel Chemicals Holding and EKA Chemicals AB: 40% reduction. Total, Elf Aquitaine and Arkema: 30% reduction. Solvay: 10% reduction.
T-85/06.	2002 Leniency Notice. Flexsys: immunity. Crompton Europe, Crompton Manufacturing Company and Chemtura Corporation: 50% reduction. Bayer: 20% reduction. General Quimica, Repsol Quimica and Repsol YPF: 10% reduction.
T-26/06; T-51/06; T-53/06; T-59/06; T-64/06; T-65/06; T-68/06; T-79/06.	2002 Leniency Notice. British Polythene Industries: immunity. Trioplast Wittenheim and Trioplast Industrier: 30% reduction. Cofira-Sac, Bischof & Klein, Co KG and Bischof & Klein France: 25% reduction. Bonar Technical Fabrics, Low & Bonar plc and Nordfolien: 10% reduction.
T-11/06; T-12/06; T-19/06; T-25/06; T-39/06.	2002 Leniency Notice. No immunity granted. Deltafina: conditional immunity at the beginning of the procedure, but withheld due to serious breach of co-operation obligations; fine reduction only. Mindo: 50% reduction. Transcatab: 30% reduction.
T-448/05; T-452/05; T-456/05; T-457/05.	1996 Leniency Notice. Fine reductions were granted to: Belgian Sewing Thread, Gütermann and Zwicky.

- **Evidence that reveals the cartel covers a wider geographic area, more products or services, more participants or a longer period of time than was initially thought.** This applies where the Commission has already been able to prove the existence of a cartel. In that situation, under the current rules the leniency applicant gains two benefits:
  - a reduced fine in relation to the cartel that has already been proven;
  - immunity from that part of the fine that deals with the additional cartel elements the applicant has brought to the Commission's attention.

- **Revocation of conditional immunity.** In the first case of its kind, the Commission has withdrawn conditional immunity because a leniency applicant has failed to comply with its duty to co-operate fully and continuously throughout the Commission's administrative procedure (*see box, Revocation of immunity in the EU - Deltafina*).

  Section 12 of the Draft Notice clarifies the concept of continued co-operation. The immunity applicant must not destroy, falsify or conceal relevant information or documents (even when it is still contemplating making its application). It must end its infringement (except for what, in the Commission's view, is reasonably necessary to preserve the

REVOCATION OF IMMUNITY IN THE US - STOLT-NIELSEN

The following represents a timeline of this important case, the first in which immunity has been revoked in the US:

- **January 2003.** The Antitrust Division issued a grant of conditional immunity to Stolt-Nielsen in a pending investigation into the international tanker shipping cartel.
- **March 2004.** The Antitrust Division informed Stolt-Nielsen that its amnesty was being revoked as its unlawful activities had continued for eight months longer than it had represented in its amnesty application.
- **January 2005.** The US District Court for the Eastern District of Pennsylvania issued an injunction upholding Stolt Nielsen's amnesty and barring the government from indicting the company for its participation in the cartel.
- **May 2006.** On appeal, the US Third Circuit overturned the injunction, finding that the District Court had lacked authority to enjoin the government's indictments, and that as Stolt-Nielsen could use the amnesty agreement as a defence in the prosecution, injunctions should not be granted for separation-of-power reasons (*Stolt-Nielsen SA v United States, 2006 442 F. 3d 177 (3d Cir 2006)*).
- **August 2006.** The Supreme Court denied Stolt-Nielsen's petition to restore the injunction.
- **September 2006.** Stolt-Nielsen, two subsidiaries and two executives were indicted by a federal grand jury in Philadelphia, Pennsylvania (*see www.usdoj.gov/atr/public/press_releases/2006/218199.htm*).
- **October 2006.** The Supreme Court declined to consider Stolt-Nielsen's appeal of the Third Circuit's ruling.

integrity of the inspections). The requirement of continued co-operation is now extended from immunity to also cover leniency applicants (*section 24, Draft Notice*).

- **Oral proffers.** The Draft Notice supersedes an earlier draft amended notice on oral proffers (dated February 2006). Oral proffers are used in the US and are already standard practice in the EU. They enable leniency applicants to confess their participation in a cartel and give all relevant information in the form of an oral corporate statement, which is taped and transcribed. There is a written element: the oral statement must be accompanied by all available pre-existing documentary evidence of the cartel available to the applicant. The distinction between the oral and written elements concerns access to information. When the Commission, at a later stage, makes a statement of objections to the cartel participants, they will have a right of access to the file. Although these participants will have full access to the documentary evidence, they will only be able to read the transcript of the oral statement and listen to the tape at the Commission's premises, and take notes but not make copies (*sections 31 to 35, Draft Notice*). In the future, immunity applicants must provide the Commission with an oral corporate statement (*sections 9(a) and 11, Draft Notice*).

  The corporate statement remains within the Commission's control at all times. This is to minimise discoverability in national courts and to guarantee leniency applicants that they will be not put into a worse position than non-co-operating participants in civil anti-trust claims. However, in line with recent case law, the Commission views the corporate statement as genuine evidence which, when corroborated, can constitute adequate proof of the cartel, and not as a guide to obtain a better understanding of the case (*JFE Engineering Corp and others v Commission (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00) [2004]*). The Commission remains concerned about the potential discoverability of corporate statements in private US litigation under Rule 26 of the Federal Rules of Civil Procedure (*see below, Private litigation, The EU: US discovery in private litigation*).

- **Markers.** The 2002 Leniency Notice requires applicants to immediately provide all the available evidence (*paragraph 13(a), 2002 Leniency Notice*). Although the 2002 Leniency Notice does allow an immunity applicant to submit hypothetical evidence, it must still present a descriptive list of the evidence it proposes to disclose later (*paragraph 13(b), 2002 Leniency Notice*). More importantly, it will lose its first place in line if another company submits sufficient evidence to the Commission before the applicant has completed an internal investigation. This is less of a problem for an immunity applicant who is the first to submit evidence enabling the Commission to carry out a dawn raid (*Article 8(a), 2002 Leniency Notice*). (Under the Draft Notice, this must be evidence good enough to carry out a "targeted" dawn raid (*Article 8(a), Draft Notice*).)

  The Draft Notice proposes that the Commission be given the power to grant markers to protect an immunity applicant's place in the queue to enable the necessary information and evidence to be obtained (*section 15, Draft Notice*). This means that companies can now apply for immunity immediately after they learn about their cartel involvement by submitting some documentary evidence, while carrying out a full internal investigation. This is a significant departure, as the 2002 Leniency Notice and the leniency programmes of most NCAs do not have a marker system.

One of the most striking current issues in relation to European leniency programmes is the lack of harmonisation between leniency programmes in the EU. The NCAs of most member states have leniency programmes (covering EU competition infringements as well as infringements of national competition laws). These all have similar objectives (to achieve better and faster rates of detection and higher deterrence, and to reduce the burden to consumers and others of the cost of cartels). However, there are also many differences between the national systems themselves, and between the national systems and the EU leniency programme. These range from the cosmetic to the serious. For example:

- Differences in the underlying competition law (particularly as between criminal and administrative enforcement).

- Different views on:
  - the merits of markers;
  - whether there should be a limit on the number of companies entitled to receive a reduction in fines; and
  - whether leniency applicants must provide continuing co-operation to the NCA.

One of the sharpest differences concerns the quality of evidence required from the immunity applicant. For example, Belgium, Finland, France and Germany have a similar test: the applicant must put the competition authority in a position to adopt a prohibition decision. However, the burden imposed on the applicant differs:

- **Finland and Germany.** Immunity is only available where the NCA had no previous evidence of the cartel.
- **France.** Immunity is available if the evidence provided was not previously available to the NCA and helps to prove the cartel and identify its members.
- **Belgium.** Immunity is only granted if the NCA would not have been able to prove the cartel without the information, not whether there was enough evidence to start an investigation.

Finally, some member states do not have a leniency programme at all, including Italy, Malta, Slovenia and Denmark.

The European Competition Network (ECN) (the body that provides a mechanism for co-operation between EU national competition authorities), has a great deal of work before it can remedy the effects of this lack of harmonisation, particularly in the absence of a one-stop-shop for leniency applicants. The publication, on 29 September 2006, of the ECN's Model Leniency Programme represents a first step towards a closer harmonisation of national and EU programmes.

PRIVATE LITIGATION

The US

Recent developments have taken place in the *Hoffman-La Roche Ltd v Empagran SA* litigation. The following is a brief history of the early stages of the litigation, together with the more recent developments:

- **Case history.** A class action claim for damages arising from a vitamins cartel was brought on behalf of foreign purchasers of the vitamin products. The US Supreme Court held unanimously that the claimants' asserted injury had to arise from the US effects of the challenged conduct and that it was not sufficient for some other party to have been injured in US commerce by the unlawful conduct (*F Hoffmann-La Roche Ltd v Empagran SA 542 US 155 (2004)*).

  The Supreme Court then returned the *Empagran* case to the US Court of Appeals for the District of Columbia Circuit (DC Circuit) to consider, in the first instance, the legal viability of the claimants' alternative claim (that the US would still be an appropriate jurisdiction if the foreign claimants could show that their foreign injuries would not have been possible "but for" the US domestic effects, given the economic interdependence of the US and foreign vitamins markets).

  On 28 June 2005, a unanimous panel of the DC Circuit decisively rejected the *Empagran* claimants' alternative claim as a matter of law and ordered dismissal of the action in its entirety on the principal ground that the appropriate legal test was not "but for" causation, but rather "proximate cause" (*Empagran SA v F Hoffmann-LaRoche Ltd, 417 F.3d 1267 (DC Cir 2005)*). Finding that the claimants' alleged foreign injuries were proximately caused by the foreign effects of price-fixing outside of the US, and that such injuries were at best only indirectly caused by the conspiracy's alleged US effects, the panel ruled that the claimants' claims failed to meet the requirements for subject matter jurisdiction in the US courts.

  The Supreme Court declined to review this decision on 6 January 2006.

- **Recent developments.** On 1 August 2006 the District Court for the District of Columbia refused the claimants' most recent attempt to reopen the litigation (*Empagran SA v F Hoffman-LaRoche Ltd, Civ No 00-1686, 2006 US Dist LEXIS 52946 (DDC 1 August 2006)*). The claimants had argued that the lack of an adequate mechanism for the private enforcement of anti-trust law in the EU meant that they should be allowed to continue their claim on behalf of EU direct vitamin purchasers. Noting that it lacked original jurisdiction over any viable federal claim in the US, the District Court declined to exercise supplemental jurisdiction over the claims of EU direct purchasers under the EU anti-trust laws. It noted that the claimants' true argument was not that it was impossible to bring anti-trust claims in the EU, but rather that the prospects in damages were less advantageous than in the US. The court referred to the Commission's recent Green Paper on private remedies and stated that it would be

REVOCATION OF IMMUNITY IN THE EU - DELTAFINA

In October 2005, the Commission adopted its first prohibition decision based on information submitted by an immunity applicant (Deltafina) under the Leniency Notice (*Raw Tobacco IT (Case COMP/38.281)*). This was also the first decision in which the Commission withdrew conditional immunity. This was on the basis that Deltafina had failed to comply with its duty to co-operate fully and continuously throughout the Commission's administrative procedure (*paragraph 11(a), 2002 Leniency Notice*). This was because it had revealed its immunity application to the other cartel participants before the Commission had been able to carry out surprise visits at the premises of those companies.

Deltafina has challenged the prohibition decision, arguing that it had informed the Commission's services that it had revealed its application, and those services had accepted the fact that it had to do so.

COURT OF FIRST INSTANCE (CFI) AND EUROPEAN COURT OF JUSTICE (ECJ) JUDGMENTS SINCE OCTOBER 2005			
Cartel	**European Commission case reference**	**Total European Commission fines paid by all the parties**	**CFI or ECJ case references**
Citric Acid	COMP/36.604, 5 December 2001.	EUR135.22 million (about US$171.7 million).	T-43/02; T-59/02.
Sodium Gluconate	COMP/36.756, 2 October 2001.	EUR57.53 million (about US$73.06 million).	T-314/01; T-322/01; T-329/01; T-330/01.
Nederlandse Federatieve Vereniging voor de Groothandel op Elekitrotechnisch Gebied	COMP/33.884, 26 October 1999.	EUR6.55 million (about US$8.31 million).	C-105/04P.
JCB Service	COMP/35.918, 21 December 2000.	EUR39.6 million (about US$50.2 million).	C-167/04P.
Industrial and Medical Gases	COMP/36.700, 24 July 2002.	EUR25.72 million (about US$32.6 million).	T-304/02.
Amino Acids	COMP/36.545, 7 June 2000.	EUR110 million (about US$139.7 million).	C-397/03P.
Vitamins	COMP/37.512, 21 November 2001.	EUR855.22 million (about US$1086 million).	T-15/02; T-26/02; Joined Cases T-22/02 & T-23/02.
Zinc Phosphate	COMP/37.027, 11 December 2001.	EUR11.95 million (about US$15.1 million).	T-33/02; T-52/02; T-62/02; T-64/02.
Belgian Brewers	COMP/37.614, 5 December 2002.	EUR91.5 million (US$110.9 million).	T-38/02; T48/02; C-3/06.
Seamless steel tubes	COMP/35.860, 8 December 1999.	EUR99 million (about US$120 million).	C-411/04P; C-403/04P; C-405/04P.
Graphite Electrodes	COMP/36.490, 18 July 2001.	EUR165 million (about US$200 million).	C-289/04P; C-301/04P; C-308/04P; T-152/04.

Most recent developments	Relevance of the Notice on the non-imposition or reduction of fines in cartel cases (*OJ 1996 C207/04*) (1996 Leniency Notice) or the Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2002 C45/03*) (2002 Leniency Notice)
CFI judgment of 27 September 2006 upholding the Commission decision.	Yes (1996 Notice).
CFI judgment of 27 September 2006 confirming the Commission decision in Akzo, ADM, AVEBE and Roquette Frères, where it also reduced the fine.	Yes (1996 Notice).
CFI judgment of 16 December 2003. ECJ judgment of 21 September 2006 partially annulling CFI judgment.	No.
CFI judgment of 13 January 2004, confirming the Commission decision with a small reduction in fines. ECJ judgment of 21 September 2006, confirming CFI judgment, and annulling the reduction in fines.	No.
CFI judgment of 4 July 2006, confirmed the Commission decision.	Yes (1996 Notice).
CFI judgment of 9 July 2003, confirming the Commission decision. ECJ judgment of 18 May 2006, confirming the Commission decision.	Yes (1996 Notice).
In Joined Cases T-22/02 and T-23/02, the CFI judgment of 6 October 2005, annulled the decision of the Commission. In Cases T-15/02 and T-26/02, the CFI judgment of 15 March 2006, reduced the amount of the fines imposed by the Commission.	Yes (1996 Notice).
CFI judgment of 29 November 2005, confirming the Commission decision.	Yes (1996 Notice).
In Case T-48/02, the CFI judgment of 6 December 2005 confirmed the Commission decision. Case T-38/02 has been appealed before the Court of Justice of the European Communities on 4 January 2006 by Groupe Danone (C-3/06). The appeal is still pending.	Yes (1996 Notice).
CFI judgment of 8 July 2004 confirming the Commission decision and reducing fines. Advocate General opinion of 12 September 2006.	Yes (1996 Notice).
CFI judgment of 27 September 2006 confirming the Commission decision but reducing the fines to be paid. Advocate General opinion of 19 January 2006. In C-289/04P the ECJ confirmed the CFI judgment after appeal by Showa Denko. In C-301/04P and C-308/04P, following an appeal by the Commission and SGL, the ECJ judgment of 29 June 2006 confirmed the Commission decision and increased the fine. In a separate annulment action pending before the CFI (T-152/04), one of the parties contests a Commission decision requiring interest on the fine (lodged on 26 April 2004).	Yes (1996 Notice).

particularly inappropriate to ignore the principle of comity when the EU was attempting to enable private anti-trust damages claims to be brought (*see below, The EU: Damages actions for breaches of EC competition laws*).

The EU

The two recent developments are of importance:

- **US discovery in private litigation.** The Commission remains concerned that corporate statements submitted under oral proffers may be discoverable in private litigation in the US under Rule 26 of the Federal Rules of Civil Procedure (*see above, The amnesty and immunity programmes - current status, The EU: Oral proffers*). On 6 April 2006 the Director-General for Competition, Philip Lowe, expressed this concern to the Executive Director of the US Antitrust Modernization Commission, Andrew Heimert, in a submission available on the website of the Antitrust Modernization Commission (*see www.amc.gov/public_studies_fr28902/international_pdf/060406_DGComp_Intl.pdf*). Referring to the Commission's earlier interventions in US District Court cases (*Re: Vitamins Antitrust Litigation, Misc No 99-197 (TFH) MDL No. 1285 (D. Columbia, 4 April 2002)* and *Re: Methionine Antitrust Litigation, Case No C-99-3491 CRB (JSC) MDL No 1311 (Northern District of California, 29 July 2002)*), and at the Supreme Court (*Intel Corporation v Advanced Micro Devices Inc 542 US 2004 No. 02-572*), he argued that:
  - international comity must outweigh US discovery considerations;
  - a broad application of Rule 26 could hamper the enforcement actions of other agencies (including the US Department of Justice).
- **Damages actions for breach of EC competition laws.** The Commission states that damages actions contribute to the effective deterrence of cartel activity, but that consideration should be given to their impact on the operation of leniency programmes (*European Commission Green Paper on damages actions for breaches of the EC Treaty anti-trust rules (COM (2005) 672 Final, 19 December 2005)*). However, no member state explicitly deals with this issue.Therefore, in its Green Paper, the Commission has set out three possible options:
  - leniency applications to be excluded from discovery (already the case for applications submitted to the Commission);
  - leniency applicants to be entitled to a rebate from private damages claims;
  - removal of joint liability from the leniency applicant, limiting its exposure to damages.

  The European Parliament is involved in the debate (Commissioner Kroes stated on 19 June 2006 that she will wait for its views later that year before deciding on next steps). During informal discussions in April and June 2006, some members of the Parliament expressed concern that the EU will copy a US litigation culture. The Commission stated that these actions should act as a deterrent for cartel activity, leading to less and not more infringing activity. This suggests that the Commission is considering private damages action as a means to enhance its public enforcement policy, rather than to enable the victims of cartel activity to obtain compensation.

FUTURE DEVELOPMENTS

In the future, there is likely to be vigorous enforcement, as before, but with an even more effective leniency policy (through the introduction of a marker) and a more deterrent fining policy (through the application of the new guidelines).

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